Filed 5/19/09 Smadi, Inc. v. Levaton CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| SMADI, INC.,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JACK LEVATON,<br><br>Defendant and Appellant. | B205991<br><br>(Los Angeles County<br>Super. Ct. No. EC020576) |

APPEAL from an order of the Superior Court of Los Angeles County. Charles W. Stoll, Judge. Affirmed.

Jack Levaton, in pro. per., for Defendant and Appellant.

Law Offices of Scott J. Nord and Scott J. Nord for Plaintiff and Respondent.

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Jack Levaton appeals from the trial court's denial of his motion to vacate a default judgment entered in 1997 and the subsequent sheriff's sale of a piece of property in satisfaction of that judgment. We affirm.

## FACTS

Egal Levaton and his former wife, Riki Levaton,[1] owned three adjoining parcels of property[2] in San Fernando, California (San Fernando Properties) which suffered damage in the Northridge earthquake. In 1994, the Levatons contracted with Smadi, Inc. (dba Hart Construction) to make repairs and construct improvements on the San Fernando Properties. Egal and Smadi's principal, Morecchai Bronchman, have known each other since the early 1980's. To finance the project, the Levatons borrowed $1,086,700 from the Small Business Administration (SBA), which was secured by three deeds of trust on the San Fernando Properties.

### I. 1997 Default

In 1996, Smadi brought this action against the Levatons for breach of contract and received a default judgment a year later in the amount of $436,963. Riki unsuccessfully filed a motion for relief from default in November 1997. Smadi recovered $27,777.24 on the judgment after levying against a third party who owed rent to Egal but the balance remained outstanding. The judgment was also partially satisfied on May 23, 2001 when the sheriff sold the "right, title and interest of the judgment debtor" in another San Fernando property located at 1204 San Fernando Road (San Fernando Two) to Smadi for $260,000. In early 2002, the sheriff again levied on Smadi's judgment and sold Egal's property located in Glendale (Glendale Property) to Smadi at an execution sale. Smadi filed a full satisfaction of judgment on February 3, 2005.

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[1] For ease of reference and meaning no disrespect, we will refer to the members of the Levaton family by their first names.

[2] The parcels were: 1404, 1412 and 1419-1425 San Fernando Road.

## II. 2001 Default

At some point, Egal and Riki defaulted on the SBA loan and in 2001, the SBA assigned its note and deed of trust to WAMCOXXVIII Ltd, which then sold the note and the beneficial interest in the trust deeds to Egal's brother, Jack. On August 29, 2001, Jack obtained a default judgment for $1,415,292.65 against Egal and Riki on the SBA loan, and sought a judicial foreclosure of the San Fernando Properties. The judgment directed the sheriff to sell the San Fernando Properties and apply the proceeds to the judgment, with Egal and Riki personally liable for the remainder if the sale proceeds were insufficient to satisfy the judgment. Jack bought the San Fernando Properties for $200,000 on June 25, 2002. That same day, Jack purchased San Fernando Two pursuant to a writ of execution sale and thereafter began to collect rent from a commercial tenant occupying San Fernando Two. The tenant received a demand for rent from Smadi in late June 2006. On July 2006, Smadi filed an action against Jack seeking to recover the rent paid by the commercial tenant at San Fernando Two.

## III. Subsequent Litigation and Court Filings

Egal filed for bankruptcy on June 27, 2002, after title to the San Fernando Properties, San Fernando Two and the Glendale Property had passed to either Smadi or Jack. Egal's bankruptcy filing lists Jack as a creditor holding an unsecured nonpriority claim of unknown amount along with Riki's attorneys.[3] The bankruptcy court entered an order of discharge on October 7, 2002.

Thereafter, on February 21, 2003, Egal managed to have Smadi quit claim San Fernando Two and the Glendale Property to an entity he created called Smada, Inc. through the executor of deeds by a person signing as "Menash Agrabily." On January 14, 2005, Smadi filed suit against Smada, Egal and Riki seeking quiet title to San Fernando Two and the Glendale Property. A notice of pendency of action against San Fernando Two and the Glendale Properties was filed in the County Recorder's Office on February

[3] At some point prior to his bankruptcy filing, Egal divorced Riki.

7, 2005 by Smadi, four months before Jack purchased them on June 25, 2005 at the sheriff's execution sale. Notably, this was the second time Jack bought San Fernando Two at an execution sale and it was three years, to the day, after the first purchase. The Honorable Michael S. Mink of the Los Angeles Superior Court presided over a three day bench trial in the quiet title action beginning May 2, 2006. Although he claimed he did not represent Jack, Egal's counsel discussed at length Jack's interest in San Fernando Two. On June 6, 2006, Judge Mink issued the following statement of decision as to San Fernando Two:

> "There is **no question** that [Egal] engaged in a massive criminally fraudulent scheme to defraud, (a) his creditors, including Plaintiff [Smadi]; (b) the United States Bankruptcy Court, and probably (c) the Los Angeles Superior Court, (d) the Small Business Administration, and (e) Riki Levaton, his former wife[.] The **only** question to be determined by the Court is whether Plaintiff [Brochman] was a victim or a co-conspirator. Plaintiff alleges he was a victim and Defendant [Egal], in essence, alleged that [Brochman] was a co-conspirator. After considering all of the evidence as set forth above, it is the finding of the court by a preponderance of the evidence, that [Bronchman] was a victim of [Egal's] fraud.
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> "[Egal] used the processes of this Court to conceal his parcels of real property from the bankruptcy court and his creditors. He carefully orchestrated a scheme to hide his parcels of real property in the names of his brother, Jack Levaton, and [Brochman's] Corporation Smadi, Inc. He then used his daughter TL to incorporate a new corporation, which he named Smada, Inc., and into which he then caused title to San Fernando Two and the Glendale Properties to be transferred. This was accomplished through the means of fraudulent quitclaim deeds executed by one Menash Agrabily. [Egal] then caused Smada, Inc. to convey title to San Fernando Two and the Glendale Properties to his name, so that his brother, Jack Levaton, could take title to them by means of a Sheriff's execution sales [*sic*], in which [Egal] and Jack Levaton were assisted by Mr. Glannel, which sale took place on June 25, 2003. This was done to attempt to insulate them from any judgment which might thereafter be obtained by Smadi, Inc. It should be noted that [Egal's] brother had previously purchased the San Fernando Properties at an earlier execution sale on his judgment and it should also be noted that the balance owing on his brother's judgment upon which he executed had previously been discharged by order of the Bankruptcy Court, on October 7, 2002. Moreover, Plaintiff's judgment was listed as a debt in [Egal's] bankruptcy,

even though, a 'Full Satisfaction of Judgment' had been provided to [Egal] by [Bronchman] in March of 2002. [Footnote omitted.]"

Judge Mink voided the quit claim transfer from Smadi to Smada and found "that Plaintiff [Smadi] is the true legal and beneficial owner of [San Fernando Two]."

## IV. Motion to Vacate

On September 5, 2007, Jack filed a motion in this action to set aside the default judgment entered in 1997 and to cancel the sheriff's sale of San Fernando Two to Smadi in 2001. The Honorable Charles W. Stoll, who also entered the original 1997 default judgment, denied Jack's motion on October 12, 2007, ruling as follows:

> "[Jack] now seeks to show that he has an interest based on his argument that the default judgment was void. [Jack] argues that Plaintiff [Smadi] provided false testimony at the default prove-up and that the judgment is in excess of the amount sought in the pleadings.
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> "He claims there was fraud committed on the court by providing false evidence at a default prove-up hearing, and he attaches documents, including in paragraph 8 of the complaint stating that defendants agreed to a supplemental written agreement under which the defendants retained the Plaintiff to provide additional services and labor. The additional contract is evidenced by the documents attached to Exhibit B of the complaint. A review of Exhibit B shows that it contains numerous change orders.
>
> "First, this is not grounds to set aside the judgment, because a final judgment may only be set aside if it has been obtained through fraud that was extrinsic, not intrinsic. See the case of *In re Marriage of Stevenot*, 154 Cal.App.3d at 1051. Intrinsic fraud occurs when a party had notice of an action and had the opportunity to present his or her case and protect himself or herself from any mistake or fraud of his or her adversary, but unreasonably neglected to do so. This is based on the reasoning that a party cannot obtain relief from fraud that may have occurred at the trial when the party should have guarded against the fraud by appearing at the trial and defending himself or herself.
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> "Extrinsic fraud occurs when the party was deprived of a fair adversarial hearing because he was kept away from the court by a deception, or when the party was kept in ignorance of the lawsuit by the plaintiff.
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> "And here, [Jack's] argument that the change orders are false is [in]trinsic fraud because it was fraud that occurred at the default prove-up. The Defendants should have protected themselves from the alleged fraud by appearing in this case and defending themselves. Instead, after they were personally served or after they signed an acknowledgement of service,

they failed to respond to the pleadings and a default was entered against them.

"Since the arguments are based on extrinsic fraud, as a matter of law they are not grounds to set aside the default.

"In addition, the doctrine of res judicata bars Jack Levaton from denying the validity of the change orders. Since a default was entered against the defendants, they have confessed the truth of the allegations that they agreed to the change orders. The default judgment is res judicata as to these allegations, and thus Jack Levaton is stopped from denying any of the allegations that were admitted by the defendants and which have been conclusively established by the default judgment.

"The court denies the entire motion because there are no grounds to set aside the default judgment entered against the defendants Levaton, Levaton, and Eagle Inc. on May 6, 1997."

Jack filed his notice of appeal on February 20, 2008.

## DISCUSSION

In his appeal, Jack seeks to gain title to San Fernando Two and in the process, asks us to reverse the judgments of two actions—the quiet title judgment entered by Judge Mink and the 1997 default judgment entered by Judge Stoll. We decline to do so.

### I. Hearing

Jack initially complains he did not get his day in court because Judge Stoll denied his motion before hearing his oral argument. We summarily dismiss this argument because the record shows Judge Stoll was familiar with the extensive moving and reply papers filed by Jack and allowed Jack ample time to present his argument. That these arguments, both written and oral, failed to persuade Judge Stoll to change his tentative ruling does not mean Jack was not given his day in court.

### II. Extrinsic Fraud

Jack's primary contention is that the default judgment is void for fraud. In support of his motion, Jack submitted a declaration from Egal stating that the change orders were forgeries and showing cancelled checks for payments he made to Bronchman. According to Jack, fraud practiced upon the court is always grounds for invalidating a judgment.

> "Allowing SMADI to become the owner of [San Fernando Two] by introducing forged documents into evidence at the default prove-up hearing and by giving false testimony at the default hearing in [the 1997 breach of contract matter] is an *integrity of the judicial system* issue, as well as a constitutional issue because (a) only SMADI was allowed to present evidence at the default hearing, (b) no one was allowed to cross-examine SMADI's witness (the owner-manager of SMADI) at the default hearing, (c) neither Egal Levaton or Riki Levaton had any incentive to contest SMADI's claim that SMADI is the owner of the [San Fernando Property] at trial of the *straw man* quiet title action, (d) JACK was not a party in [the 1997 breach of contract action], (e) JACK was not served with notice of the *straw man* quiet title action . . . , (f) JACK was not a party in [the quiet title action], and (g) nobody represented JACK's interests or attempted to protect JACK's interest at trial of the *straw man* quiet title action . . . ."

A court has inherent, equitable power to set aside a default judgment at any time on the ground of extrinsic fraud or mistake. The terms extrinsic fraud or mistake relate to circumstances by which a party has been deprived of a fair hearing; no actual fraud or mistake in the strict sense need exist. (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342; *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300-1301.) If the fraud or mistake goes to the merits of the action, or occurred at trial, it is deemed intrinsic and not a ground for relief under the court's inherent powers.[4] (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1069.)

We agree with Judge Stoll that the intrinsic fraud alleged here —that Bronchman lied on the stand and submitted forged change orders—provides no grounds for relief, even if the allegations were true. It is undisputed that Egal and Riki were served with Smadi's complaint in 1996 and failed to answer. They were not deprived of a fair hearing in this matter. Further, Jack cannot complain he was provided no notice of the

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[4] Where the motion is made under section 473, subdivision (b) of the Code of Civil Procedure, however, relief may be granted whether the fraud is intrinsic or extrinsic. (*Rice v. Rice* (1949) 93 Cal.App.2d 646, 651.) However, a 6-month limitation applies to section 473(b). Since Jack's motion seeks to invalidate a judgment entered 10 years ago, any relief he may have had under section 473, subdivision (b) expired long ago.

matter given that he had no interest in the San Fernando Properties until 2001, when he purchased the SBA note, and no interest in San Fernando Two until 2002.[5]

Jack's reliance on *Babbit v. Babbit* (1955) 44 Cal.2d 289 and *Harada v. Fitzpatrick* (1939) 33 Cal.App.2d 453 does not help him. In both cases, the court was faced with extrinsic fraud which deprived an innocent party of her day in court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* (1944) 322 U.S. 238 is also easily distinguished in that it involved a fraud on the U.S. Patent Office that justified vacating a judgment that upheld the validity of a patent.

## III. Damages

Jack also argues that the default judgment is void because it was based on a complaint that failed to specify the exact amount of damages sought. We find Smadi's complaint sufficiently complies with the statutory requirements. (Code Civ. Proc., §§ 425.10, 580.) Indeed, Smadi's complaint alleges:

> "As the direct and proximate result of such breach of the written contract by Defendants, Plaintiff has only received Five Hundred Twenty-Eight Thousand Dollars ($528,000.00) on account of the total compensation due it, all to its damage in the sum of Four Hundred Ninety-Seven Thousand Six Hundred Ninety-Five Dollars ($497,695.00), less its cost of labor and material required to complete the project, in a sum the total of which is not presently ascertained, but will be alleged and proved when known; that such sum shall exceed the minimum jurisdictional limit of the Superior Court."

Section 580 of the Code of Civil Procedure limits the amount of relief that can be granted by default judgment. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1167.) Judge Stoll entered a judgment in the amount of $436,963.90, an amount not in excess of the damages alleged in the complaint.

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[5] To the extent Jack argues the judgment in the quiet title action is void because he was not served and was deprived of a fair hearing in that action, we decline to overstep our jurisdiction and review a case not presently before us.

## DISPOSITION

The trial court's order dated October 12, 2007, denying Appellant's motion to set aside, vacate and cancel judgment after default filed on May 6, 1997 is affirmed. Respondent Smadi, Inc. to be awarded its costs on appeal.

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BIGELOW, J.

We concur:

FLIER, Acting P. J.

BAUER, J.*

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.